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KETUA PENGARAH INSOLVENSI

v.

DATO' DR CHEN LIP KEONG & ORS

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
KN SEGARA JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: W-01(IM)-652-2010]

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26 JANUARY 2011

BANKRUPTCY: *Official Assignee - Sanction - High Court setting aside DGI's sanction granted to bankrupt to pursue suit against respondents - Whether DGI must furnish grounds for granting sanction -*

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Whether DGI must assess merit of bankrupt's suit against respondents before grant of sanction - Whether application for sanction bona fide - Whether respondents were persons aggrieved under s. 86 Bankruptcy Act 1967 - Whether respondents had locus standi to initiate application to set aside DGI's sanction - Whether respondents deprived of legal rights -

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Whether appeal allowed - Bankruptcy Act 1967, s. 38(1)(a)

This was an appeal by the Director General of Insolvency ('DGI') against the decision of the High Court in allowing the application of the respondents under s. 86 of the Bankruptcy Act 1967 ('the Act') to reverse or set aside the sanction given by the DGI to one Dato' Mohd Fathi ('the bankrupt'). The said sanction was granted under s. 38(1)(a) of the Act in respect of the bankrupt's suit against the respondents. The DGI contended that he was not obliged to assess the merit of the suit involved and that there was no duty to inform and give justification for granting the said sanction. It was also submitted that the respondents were not persons aggrieved under s. 86 of the Act and therefore they had no *locus standi* to have instituted the application to question nor set aside the said sanction. On the other hand, the respondents contended that in granting the sanction to the bankrupt, the DGI had total disregard of the factual background of the suit filed by the bankrupt against the respondents. Thus, the sanction granted was improper and was correctly set aside by the High Court.

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Held (allowing the appeal)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The meaning of the words "person aggrieved" would have to be ascertained with reference to the purpose and provisions of the statute in question. The meaning may vary according to the context of the statute. Sometimes, certain statutes give it a restricted meaning which requires denial or deprivation of legal rights. (paras 22 & 23)

(2) The meaning of the words "person aggrieved" must have related to the exercise of the DGI's discretion and power under s. 38(1)(a) of the Act in granting sanction to the bankrupt in order to maintain and pursue an action in court. If the DGI was satisfied that the estate of the bankrupt could be enhanced by maintaining or proceeding with the action or defence thereof, then the DGI might grant the sanction. There was no indication to show that the respondents had been denied or deprived of something to which they were legally entitled. The respondents were parties to the action and therefore were not persons aggrieved for the purpose of s. 38(1)(a) of the Act. As such, the respondents had no *locus standi* to have initiated the application under s. 86 of the Act. (paras 24, 26, 27, 28 & 36)

(3) The DGI was satisfied that the application for sanction was made *bona fide* and that there was reasonable chance of success. In coming to that satisfaction, the DGI was not bound to have gone into much detail consideration on the merit of the action. Whether the action would be successful or not was not for the DGI to consider at the stage of granting the sanction. The DGI had to be satisfied that there was an arguable and triable issue in favour of the bankrupt. (para 30)

(4) The granting of the sanction was regular and in accordance with the standard procedures established by the DGI's office. All the necessary conditions were duly fulfilled and complied with. Thus, there was no reason why the DGI should refuse the said sanction. (para 35)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan oleh Ketua Pengarah Insolvensi ('DGI') terhadap keputusan Mahkamah Tinggi dalam membenarkan permohonan responden-responden di bawah s. 86 Akta Bankrapsi
B 1967 ('Akta tersebut') untuk mengakaskan atau mengenepikan sanksi yang telah diberikan oleh DGI kepada seorang Dato' Mohd Fathi ('si bankrap'). Sanksi tersebut telah dibenarkan di bawah s. 38(1)(a) Akta tersebut berkenaan guaman yang telah difailkan oleh si bankrap terhadap responden-responden. DGI berhujah
C bahawa beliau tidak mempunyai obligasi untuk mentafsirkan merit guaman yang terlibat dan juga tidak bertanggungjawab untuk memaklumkan dan memberikan justifikasi memberi kebenaran sanksi tersebut. Juga dihujahkan bahawa memandangkan responden-responden bukan "pihak yang terkilan" di bawah s. 86 Akta
D tersebut, maka mereka tidak mempunyai *"locus standi"* untuk memulakan permohonan bagi menyoal atau mengenepikan sanksi tersebut. Sebaliknya, responden-responden berhujah bahawa dalam membenarkan sanksi kepada si bankrap, DGI telah gagal mengambilkira fakta latar belakang guaman yang difailkan oleh si
E bankrap terhadap responden-responden. Maka, sanksi yang diberikan tersebut adalah tidak wajar dan telah diketepikan dengan betul oleh Mahkamah Tinggi.

Diputuskan (membenarkan rayuan)
F **Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:**

(1) Maksud perkataan "pihak yang terkilan" perlu dikenalpasti dengan membuat rujukan kepada kehendak dan peruntukan statut yang berkenaan. Maksudnya mungkin akan berbeza berdasarkan konteks sesuatu statut. Kadangkala, beberapa
G statut memberi maksud terhad yang mengkehendaki penafian atau menjadi penghalang hak asasi undang-undang.

(2) Maksud perkataan "pihak yang terkilan" mesti dikaitkan dengan budibicara DGI dan kuasanya di bawah s. 38(1)(a) Akta
H tersebut dalam membenarkan sanksi kepada si bankrap bagi mengekalkan dan meneruskan sesuatu guaman di mahkamah. Jika DGI berpuas hati bahawa estet si bankrap boleh ditambah nilainya dengan mengekalkan atau meneruskan guaman atau pembelaan tersebut, maka DGI boleh membenarkan sanksi
I tersebut. Di dalam melaksanakan kuasa dan budibicaranya, DGI dikawal oleh s. 85(4) Akta tersebut. Tiada sebarang

petanda untuk menunjukkan bahawa responden-responden telah dihalang daripada sesuatu di mana mereka layak dari segi undang-undang. Responden-responden adalah pihak kepada guaman dan oleh itu, mereka bukan "pihak yang terkilan" bagi kehendak peruntukan di bawah s. 38(1)(a) Akta tersebut. Oleh yang demikian, responden-responden tidak mempunyai *locus standi* dalam memulakan permohonan di bawah s. 86 Akta tersebut.

(3) DGI telah berpuas hati bahawa permohonan untuk sanksi dibuat secara *bona fide* dan mempunyai peluang yang munasabah untuk menang. Di dalam mencapai kepuasan tersebut, DGI tidak perlu meneliti merit guaman secara terperinci. Sama ada guaman tersebut akan berjaya atau tidak bukanlah untuk dipertimbangkan oleh DGI pada tahap memberi kebenaran sanksi. DGI perlu puas hati bahawa terdapat isu untuk dibicarakan yang memihak si bankrap.

(4) Kebenaran sanksi tersebut oleh pejabat DGI adalah teratur dan menepati prosedur mantap. Segala syarat-syarat yang diperlukan telah ditepati dan dipatuhi. Oleh yang demikian, tiada sebarang sebab kenapa DGI perlu menolak sanksi tersebut.

Case(s) referred to:
Bar Council of Maharashtra v. MV Dabholkar AIR [1975] SC 2092 ***(refd)***
Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC ***(refd)***
Cheong Sooi Loong, Re [1992] 4 CLJ 2063; [1992] 2 CLJ (Rep) 237 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(a), 85(4), 86

Other source(s) referred to:
LB Curzon's Dictionary of Law, 6th edn, p 15

For the appellant - Shamsol Zakri SFC
For the respondents - Felix Raj (James Khong with him); M/s Shaikh David Raj

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: D6(D1)-29-5236-1992]

[Editor's note: For the High Court judgment, please see Ketua Pengarah Insolvensi v. Dato' Dr Chen Lip Keong & Ors [2011] 3 CLJ 946.]

Reported by Kumitha Abdul Majid

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JUDGMENT

Ramly Ali JCA:

[1] The present appeal, by the Director General of Insolvency (DGI) as the appellant, is against the decision of the learned Judicial Commissioner who had on 22 September 2010 affirmed the decision of the learned Senior Assistant Registrar (SAR) who had allowed the applications of the respondents under s. 86 of the Bankruptcy Act 1967 (the Act) to reverse or to set aside the sanction given by the DGI to the bankrupt, one Dato' Mohd Fathi bin Haji Ahmad to continue/commence/defend the Kuala Lumpur High Court Civil Suit No. D3-22-1218-1990 (D3 suit).

Factual Background

[2] In 1989, the 1st and 3rd respondents commenced action against the bankrupt (Dato' Mohd Fathi bin Haji Ahmad) for a claim of RM26 million and RM94.5 million respectively together with interest in respect of 11,979,333 ordinary shares in First Malaysia Finance Bhd (First Malaysia) arising from a Shares Sale and Purchase Agreement dated 28 December 1984. In 1990, the bankrupt commenced an action against all the respondents for damages in respect of the shares. Both the suits were consolidated and as at 20 November 2006, both suits were pending trial.

[3] On 20 November 2006, Adjudication and Receiving Orders (AORO) were obtained by another creditor, Standard Chartered Bank for a judgment sum of RM9,905,514.54 against the bankrupt. The bankrupt's appeal against the AORO to the Court of Appeal was dismissed. Application for leave to appeal to the Federal Court was also dismissed.

[4] Both the suits were stayed, to enable the bankrupt to obtain the requisite sanction of the DGI under s. 38(1)(a) of the Bankruptcy Act 1967. The bankrupt then applied for the said sanction.

[5] On 4 December 2008, the DGI granted conditional sanction subject to the following conditions:

(a) the bankrupt must furnish a competent guarantor who must sign a letter of undertaking and security bond at the Kuala Lumpur Insolvency Department;

(b) the guarantor is to deposit RM3,000 by way of bank draft/ postal order. The guarantor must give an undertaking that any costs, payment or expenses arising in consequence of the case should be borne by the guarantor and the guarantor will not make any claim on the Director General of Insolvency Department or estate of the bankrupt;

(c) the Director General of Insolvency Department will not be responsible for any failure, loss or any costs incurred against any party in the proceedings; and

(d) the solicitor representing the bankrupt must update the Director General of Insolvency Department with regards to the status of the case in writing.

[6] On 23 December 2008 the DGI granted the sanction to the bankrupt to pursue the suits, against the respondents.

[7] On 6 February 2009, the respondents requested the DGI to furnish them with his grounds for granting the sanction to the bankrupt as well as to inform them whether the guarantor had paid the deposit sum as required.

[8] On 19 November 2009, the respondents again wrote to the DGI to enquire whether the estate of the bankrupt was prepared to pay the sum RM300,000 as security for costs.

[9] Dissatisfied with the sanction given by the DGI, the respondents filed their application to the court to set aside the DGI's sanction.

[10] On 29 June 2010 the learned Senior Assistant Registrar (SAR) allowed the respondent's applications. On appeal to the judge in chambers, the decision of the learned SAR was affirmed and the DGI's appeal was dismissed. Hence the present appeal.

DGI's Contention

[11] The DGI contended that he is not obliged to assess the merit of the suits involved in the application for sanction by the bankrupt and no duty of the DGI to inform and give justification for granting the sanction to the bankrupt pursuant to the Bankruptcy Act 1967.

[12] The DGI also contended that the respondents were not "persons aggrieved" under s. 86 of the Bankruptcy Act 1967 and therefore have no *locus standi* to initiate the application to question and to set aside the sanction given by the DGI.

[13] The DGI further contended that the sanction granted was in order and valid, after taking into consideration all the relevant factors particularly the interest and the affairs of the bankrupt in pursuing the suits, and the issue relating to security for costs in the event the bankrupt fails in the suits concerned.

Respondents' Contention

[14] The respondents, on the other hand, submitted that the exercise of the DGI's discretionary powers under s. 38(1)(a) of the Bankruptcy Act 1967 must be premised on sound reasons as to why sanction ought or ought not to be granted to the bankrupt to maintain a legal action. The DGI's conducts or decision are subject to challenge, not only by the bankrupt or the creditors, but also the respondents who are considered as "any other person aggrieved" by the said conduct or decision.

[15] The respondents submitted that the DGI's decision in granting the sanction to the bankrupt had been made with total disregard of the factual background of the matter, particularly the background of the suit filed by the bankrupt against the respondents in 1990; the present status and value of the subject shares (First Malaysia Finance Bhd shares); the rights of the bankrupt in the shares, which are merely beneficial; and whether the claim is ineffectual or at the very least, whether enforceable in law.

[16] The sanction, according to the respondents, was improperly granted and was correctly set aside by the High Court.

Decision Of The Learned Judicial Commissioner

[17] The learned Judicial Commissioner had among others, decided as follows:

(a) the respondents are "aggrieved persons";

(b) that the DGI had failed to carry out an in-depth study into the merits of the D3 suit or to take legal opinion on it hence was not in a position to determine meaningfully whether the estate of the bankrupt would really benefit from the continuance of the suit;

(c) that as the DGI's decision to grant the sanction was an exercise of a quasi-judicial nature it is incumbent upon the DGI to give reasons to support his decision and to inform a party who is aggrieved by the decision;

(d) that the bankrupt's estate not having funds to furnish RM300,000 as security for costs will not be in a position to settle the judgment debt of RM9,905,514.54 due to the judgment creditor;

(e) that the DGI failed and/or neglected to address the fears of the respondents in not being able to recover the costs in the D3 suit in the event the suit is dismissed against them; and

(f) that the DGI's decision to grant the sanction, "... must be on an informed basis and not made purely as an administrative decision ...".

Decision Of This Court

[18] The first issue to be determined is whether the respondents are "persons aggrieved" for the purpose of s. 86 of the Bankruptcy Act 1967 and have the necessary *locus standi* to institute the present application to set aside the DGI's decision to grant sanction to the bankrupt.

[19] Section 86 of the Act provides that:

> If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Director General of Insolvency, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[20] The respondent claimed that they are "persons aggrieved" by the decision of the DGI to grant sanction to the bankrupt, and therefore have *locus standi* to file the application.

[21] In *L.B Curzon's Dictionary of Law*, 6th edn (at p. 15), "aggrieved person" is defined as:

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> A man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something: per James LJ in *Ex p Sidebotham* [1880] 14 Ch D 458.

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[22] This court is of the view that the meaning of the words "person aggrieved" will have to be ascertained with reference to the purpose and the provisions of the statute in question. The meaning may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a

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decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one a "person aggrieved". (see: *Bar Council of Maharashtra v. MV Dabholkar* AIR [1975] SC 2092; adopted by the Federal Court in

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Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317).

[23] The meaning of the words "person aggrieved" is sometimes given a restricted meaning in certain statutes which provide

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remedies for the protection of private legal right. The restricted meaning requires denial or deprivation of legal rights (see: *Bar Council of Maharashtra v. M V Dabholkar (supra)*).

[24] In the present case, the meaning of the words "person

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aggrieved" must relate to the exercise of the DGI's discretion and power under s. 38(1)(a) of the Bankruptcy Act in granting sanction to the bankrupt to maintain and pursue an action in court (other than an action for damages in respect of an injury to his person).

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[25] In exercising his power and discretion under s. 38(1)(a), either to grant or refuse sanction, the DGI is governed by s. 85(4) of the same Act which provides:

> Subject to this Act, the Director General of Insolvency shall use

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his own discretion in the administration of the property of the bankrupt.

[26] The paramount consideration in exercising his discretion under s. 38(1)(a), is the administration of the property of the bankrupt. If the DGI is satisfied that by maintaining or proceeding

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with the action or defence thereof, the estate of the bankrupt can

be enhanced, then the DGI may grant sanction to enable the bankrupt to do so. In doing so, the DGI need not go into the merit of the case in great detail.

[27] In this context, the court is of the view that "person aggrieved" should not include the other party or parties to the action in question. In the present case, there is no indication to show that the other party or parties to the action (ie, the respondents) have been denied or deprived of something to which they are legally entitled, just on the ground that sanction is granted to the bankrupt to maintain or proceed with the action. There is also no indication to show that by granting sanction to the bankrupt, the other party or parties to the action (the respondents) have suffered legal grievance which has wrongfully deprived them of something, or wrongfully refused them of something or wrongfully affected their title to something. Also there is no denial or deprivation of their legal rights.

[28] The respondents in the present case are parties to the action, in question and therefore are not 'person aggrieved' for the purpose of s. 38(1)(a) read together with s. 86 of the Bankruptcy Act. Thus, the respondents have no *locus standi* to initiate the present application before the court.

[29] The next issue to be determined is whether the learned Judicial Commissioner was correct in his finding that the DGI had failed to consider the merit of the action in detail, and that sanction should not have been granted in this case.

[30] With respect, this court is of the view that the learned Judicial Commissioner had erred in coming to the above finding. In this case, the DGI had correctly exercised his discretion in the administration of the property of the bankrupt as provided for under s. 85(4) of the Act. The subject matter of the action in question is for recovery of property or shares or money due which can be turned into assets for the enhancement of the estate of the bankrupt. The basis of the application cannot be said to be frivolous or vexatious. The DGI was satisfied that the application for sanction was made *bona fide* and that there was reasonable chance of success. In coming to that satisfaction the DGI is not bound to go into much detail consideration on the merit of the action favorable to the bankrupt. Whether the action will be successful or not, is not for the DGI to consider at the stage of

granting sanction. What the DGI needs to be satisfied at that stage, is that there is arguable and triable issue in favour of the bankrupt in the said action. The bankrupt may face uphill task to establish his claim in the action, but that alone is not sufficient to deny him of the sanction applied for under s. 38(1)(a) of the Act. Whether the action will be successful or not is for the court to decide. (see: *Cheong Sooi Loong, Re* [1992] 4 CLJ 2063; [1992] 2 CLJ (Rep) 237).

[31] The respondents also questioned the granting of the sanction by the DGI on the ground that the estate of the bankrupt has insufficient fund to pay the costs of the proceedings in the event the action in question is dismissed with costs.

[32] In exercising his power and discretion to grant sanction to the bankrupt, the DGI has taken into consideration the issue of costs being awarded against the bankrupt in the event the action is dismissed with costs. To overcome the problem, the DGI had initially granted conditional sanction where the bankrupt was directed to provide a guarantee bond of RM3,000 together with an undertaking by a guarantor to pay whatever costs that need to be paid in the event the action is dismissed with costs by the court.

[33] In this respect, the court is in agreement with VC George J in the case of the *Cheong Sooi Loong, ex p. Hong Leong Finance Bhd (supra)* where he said:

> One misgiving the official assignee has is that should the bankrupt fail in is application it could be dismissed with costs the payment of which could make inroads into such assets that the bankrupt may have in the hands of the official assignee for the benefit of the creditors. *Per se* that is not a ground for refusing the application for sanction. If the bankrupt's intended application is bona fide and cannot be said to be frivolous and if it has a reasonable chance of succeeding, then even if it means that the estate of the bankrupt should come out with the expenses of the exercise, it seems to me that the official assignee is entitled to allow the expenses to be incurred … The official assignee has to look after not only the interest of the creditors but that of the bankrupt as well. However, in a proper case, balancing the bankrupt's interest and that of the creditors the sanction could be conditional on provision of security for the expenses and costs.

[34] This issue as to whether the said sanction granted by the DGI to the bankrupt was not in order and irregular was also raised by the respondents. This court cannot agree with the respondents on this point on the following grounds:

(a) the application filed and the granting of the sanction were made in accordance with the established procedure and practice followed by the DGI;

(b) to initiate the application, the bankrupt has fulfilled all the relevant forms relating to Undertaking by Solicitors; Undertaking by Guarantor; Statement of Affairs of the Bankrupt; chronology of case; and merit of case;

(c) from the DGI's records, the bankrupt was given all the relevant forms on 29 October 2008; the duly completed forms were submitted to the DGI office in Kuala Lumpur on 17 November 2008. On 4 December 2008 the DGI granted conditional sanction to the bankrupt;

(d) as conditions to the sanction, the DGI ordered the bankrupt to provide guarantors to sign the Undertaking by Guarantor and Guarantee Bond for a sum of RM3,000. The Guarantee Bond is for the security sum fixed by the DGI (ie, RM3,000) while the Undertaking by Guarantor will cover any additional sums such as costs and other expenses in the proceeding; and

(e) in this case, the Undertaking by Guarantor was signed by one Ahmad Sakhee bin Shamsuddin and the Guarantee Bond was signed by one Kamarulaizian binti Kamsah.

[35] This court finds that the granting of the sanction was regular and in order, in accordance with the standard procedures established by the DGl's office. All the necessary conditions were duly fulfilled and complied with. Therefore, there is no reason why the DGI should refuse the sanction as applied for by the bankrupt.

Conclusion

[36] As stated earlier, the court is satisfied that the respondents were not "person aggrieved" for the purpose of s. 86, read together with s. 38(1)(a) of the Bankruptcy Act; and therefore no *locus standi* to institute the present application. On this ground alone, the appeal must fail and can be dismissed.

[37] Even assuming the respondent have the necessary *locus standi* to institute the present application, the present appeal must also fail on merit and can be dismissed on the grounds which have been elaborated above.

[38] Therefore, this court unanimously allows the appeal with no order as to cost.